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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 STEVEN DARBY MCDONALD,

11 Plaintiff,

12 v.

13 KENNETH B. LAUREN, et al.,

14 Defendants.

CASE NO. 3:17-cv-05013-RBL-DWC

ORDER

15 Plaintiff Steven Darby McDonald, proceeding *pro se* and *in forma pauperis*, filed this
16 civil rights action under 42 U.S.C. § 1983. Currently pending before the Court are Plaintiff's
17 request that a medical expert be appointed, Renewed Motion for Counsel, request that a guardian
18 ad litem be appointed, request under Federal Rule of Civil Procedure 56(d), and request to file a
19 surreply. Dkt. 99, 190, 196, 201, 208.

20 After consideration of the relevant record, the request that a medical expert be appointed
21 (Dkt. 99) is denied, the Renewed Motion for Counsel (Dkt. 201) is denied, the request that a
22 guardian ad litem be appointed (Dkt. 190, 201) is denied, the request for a continuance under
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1 Federal Rule of Civil Procedure 56(d) (Dkt. 190, 196) is denied, and the request to file a surreply
2 (Dkt. 208) is denied.

3 **I. Medical Expert (Dkt. 99)**

4 In the Motion for Preliminary Injunction, Plaintiff requested the Court appoint a medical
5 expert under Federal Rule of Evidence 706 to review Plaintiff's prior liver evaluations and
6 recommend appropriate treatment. Dkt. 99, pp. 22-23. Rule 706 permits the appointment of an
7 expert to aid the Court; however, it does not authorize the district court to provide a plaintiff with
8 funds for an expert or to appoint such a witness on a plaintiff's behalf. *Warren v. Dep't. of*
9 *Corrections*, 2011 WL 308615, at * 1 (W.D. Wash. Jan. 26, 2011); *Gamez v. Gonzalez*, 2010
10 WL 2228427, at * 1 (E.D. Cal. June 3, 2010) (internal quotations and citations omitted)
11 (“[r]easonably construed, [Rule 706] does not contemplate the appointment of, and
12 compensation for, an expert to aid one of the parties”). Rather, “[a]ppointment [of expert
13 witnesses] may be appropriate when ‘scientific, technical, or other specialized knowledge will
14 assist the trier of fact to understand the evidence or decide a fact in issue....’” *Gamez*, 2010 WL
15 2228427, at *1 (quoting *Levi v. Director of Corrections*, 2006 WL 845733 (E.D. Cal. March 31,
16 2006)).

17 Here, Plaintiff has not shown a medical expert is necessary to aid the Court. *See* Dkt. 99.
18 Instead, Plaintiff requests the Court appoint Dr. Bohlman, a doctor who previously authored an
19 opinion regarding Plaintiff's medical care, so that Dr. Bohlman can update his opinion to show
20 Plaintiff has new degenerative changes. *Id.* at pp. 22-23. Plaintiff is essentially requesting the
21 Court appoint a medical expert to serve as Plaintiff's advocate in this action. As Rule 706 does
22 not contemplate Court appointment of an expert to aid a party, Plaintiff's request for the
23 appointment of a medical expert (Dkt. 99) is denied. *See Warren*, 2011 WL 308615, at * 2.

1 **II. Renewed Motion for Counsel (Dkt. 201)**

2 Plaintiff has filed a Renewed Motion for Counsel requesting the Court appoint him an
3 attorney. Dkt. 201. Plaintiff states the Renewed Motion for Counsel is an objection to the
4 undersigned's previous Orders denying Plaintiff Court-appointed counsel. *See* Dkt. 201, p. 1.
5 However, as Plaintiff has submitted additional evidence to be considered regarding his request
6 for counsel, the Court interprets Plaintiff's Renewed Motion for Counsel as a Motion for
7 Reconsideration.

8 Pursuant to Local Civil Rule 7(h), motions for reconsideration are disfavored and will be
9 denied absent a showing of manifest error or a showing of new facts or legal authority which
10 could not have been presented earlier with reasonable diligence. Plaintiff provided declarations
11 from two inmates who testify that fellow inmates are assisting Plaintiff in litigating this case.
12 Dkt. 202, 203. Plaintiff also provided additional evidence regarding his medical conditions. Dkt.
13 201.

14 While Plaintiff has provided new evidence, he fails to show this evidence could not have
15 been presented earlier with reasonable diligence. Regardless, the new evidence fails to meet the
16 standard for Court-appointed counsel. This case does not involve complex facts or law, and
17 Plaintiff has not shown an inability to articulate the factual basis of his claims in a fashion
18 understandable to the Court. Plaintiff has also not shown he is likely to succeed on the merits of
19 his case. *See Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103 (9th Cir. 2004);
20 *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986).

21 Plaintiff fails to show a manifest error in the Court's prior ruling or new facts or legal
22 authority which could not have been presented earlier. Therefore, Plaintiff has not met the
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1 standard outlined in Local Civil Rule 7(h). He has also failed to show Court-appointed counsel is
2 warranted at this time. Accordingly, the Renewed Motion for Counsel (Dkt. 201) is denied.

3 **III. Request for Guardian ad Litem (Dkt. 190, 201)**

4 In his Response to Defendants' Motion for Summary Judgment and in the Renewed
5 Motion for Counsel, Plaintiff requests the Court appoint a guardian ad litem to assist him in
6 responding to Defendants' Motion for Summary Judgment. *See* Dkt. 190, 201.

7 Federal Rule of Civil Procedure 17(c) states, in relevant part:

8 A minor or an incompetent person who does not have a duly appointed
9 representative may sue by a next friend or by a guardian ad litem. The court must
10 appoint a guardian ad litem – or issue another appropriate order – to protect a minor
11 or incompetent person who is unrepresented in an action.

12 “The purpose of Rule 17(c) is to protect an incompetent person’s interests in prosecuting or
13 defending a lawsuit. Once the court determines that a pro se litigant is incompetent, the court
14 generally should appoint a guardian ad litem under Rule 17(c).” *Davis v. Walker*, 745 F.3d 1303,
15 1310 (9th Cir. 2014) (internal citations omitted).

16 Here, Plaintiff states he suffers from confusion and has to have help with his Court
17 filings. *See* Dkt. 190, pp. 6-8. Plaintiff, however, does not provide evidence that he is
18 incompetent. *See* Dkt. 190, pp. 6-8. Rather, Plaintiff’s medical records show Plaintiff has
19 occasionally complained of confusion and memory difficulties and has a history of depressive
20 disorder, attention deficit/hyperactivity disorder, and unspecified personality disorder. *See* Dkt.
21 207. Medical records also show that, during a mental health assessment, Plaintiff did not present
22 as confused or disorganized in his thoughts. *Id.* at p. 69. As Plaintiff has not provided substantial
23 evidence showing he is incompetent, his request for the appointment of a guardian ad litem (Dkt.
24 190, 201) is denied. *See Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005) (finding a pro se
civil litigant is “entitled to a competency determination when substantial evidence of

1 incompetence is presented”); *Justice v. Rockwell Collins, Inc.*, 720 F. App'x 365, 367 (9th Cir.
2 2017) (finding the district court was not obligated to appoint a guardian ad litem before
3 dismissing a civil action because there was insufficient evidence of mental incompetence).

4 **IV. Rule 56(d) Request (Dkt. 190, 196)**

5 Plaintiff filed a Response (Dkt. 190) and Objection (Dkt. 196) to Defendants’ Motion for
6 Summary Judgment. In these two filings, Plaintiff requests Defendants’ Motion for Summary
7 Judgment be continued under Federal Rule of Civil Procedure 56(d) to allow Plaintiff additional
8 time to obtain discovery. *See* Dkt. 190, 196. Defendants assert Plaintiff has failed to carry his
9 burden under Rule 56(d) because he has not shown the requested records are relevant or create a
10 genuine issue of material fact. Dkt. 204.

11 Pursuant to Rule 56(a) of the Federal Rules of Civil Procedure, “the court shall grant
12 summary judgment if the movant shows that there is no genuine dispute as to any material fact
13 and the movant is entitled to judgment as a matter of law.” However, Federal Rule of Civil
14 Procedure 56(d) “provides a device for litigants to avoid summary judgment when they have not
15 had sufficient time to develop affirmative evidence.” *United States v. Kitsap Physicians Serv.*,
16 314 F.3d 995, 1000 (9th Cir. 2002). Under Rule 56(d), if the nonmoving party “shows by
17 affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its
18 opposition, the court may: (1) defer considering the motion or deny it; (2) allow time to obtain
19 affidavits or declarations or to take discovery; or (3) issue any other appropriate order.” Fed. R.
20 Civ. P. 56(d). In order to prevail under Rule 56(d), the party opposing summary judgment must
21 make ““(a) a timely application which (b) specifically identifies (c) relevant information, (d)
22 where there is some basis for believing that the information sought actually exists.”” *Emp’rs*
23 *Teamsters Local Nos. 175 & 505 Pension Trust Fund v. Clorox*, 353 F.3d 1125, 1129 (9th Cir.
24 2004) (quoting *VISA Int’l Serv. Ass’n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir.

1 1986)). The Ninth Circuit has held a Rule 56(d) continuance “should be granted almost as a
2 matter of course unless the non-moving party has not diligently pursued discovery of the
3 evidence.” *Burlington N. Santa Fe R.R. Co. v. The Assiniboine & Sioux Tribes of the Fort Peck*
4 *Reservation*, 323 F.3d 767, 773–74 (9th Cir. 2003) (internal quotation marks and citations
5 omitted).

6 Here, Plaintiff has had ample opportunity to discover information essential to his
7 opposition of Defendants’ Motion for Summary Judgment. The discovery period was initially
8 open from August 8, 2017 through December 17, 2017. Dkt. 35. The case was stayed on
9 February 26, 2018. Dkt. 140. On July 5, 2018, the Court lifted the stay and allowed discovery to
10 be completed by September 3, 2018. Dkt. 155. The Court directed motions to compel to be filed
11 on or before September 13, 2018. *Id.* On October 3, 2018, Defendants filed the Motion for
12 Summary Judgment. Dkt. 177. Plaintiff filed his Response to Defendants’ Motion for Summary
13 Judgment on October 20, 2018, wherein he referenced difficulties obtaining certain documents.
14 Dkt. 190. On November 20, 2018, Plaintiff filed the Objection as his “formal” request for a
15 continuance under Rule 56(d). Dkt. 196.

16 Following the Court’s Order extending the discovery deadline, Plaintiff did not request
17 additional time to complete discovery or file a motion to compel. *See generally* Docket.¹ Rather,
18 Plaintiff waited until after discovery closed, the deadline to file a motion compel expired, and the
19 Motion for Summary Judgment was filed to move for a continuance to obtain additional
20 discovery. Furthermore, Plaintiff did not make his “formal” request for a continuance pursuant to
21 Rule 56(d), with a supporting declaration, until November 20, 2018, forty-eight days after
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23 ¹ On September 25, 2018, Plaintiff filed a motion requesting sanctions. Dkt. 175. The Court denied the
24 motion and noted that, if Plaintiff was attempting to compel discovery, any such request was denied as untimely. *See*
Dkt. 199.

1 Defendants filed the Motion for Summary Judgment. *See* Dkt. 196. On these facts, Plaintiff's
2 failure to timely move for an extension to complete discovery or seek to compel discovery does
3 not justify deferring consideration of Defendants' Motion for Summary Judgment.

4 Plaintiff has also not adequately shown how the now-sought discovery is necessary to
5 defend the Motion for Summary Judgment. Instead, Plaintiff provides lists of documents he
6 seeks and, in a conclusory manner, states the documents are necessary to oppose Defendants'
7 Motion for Summary Judgment. The Court finds this is not sufficient to reopen discovery and
8 defer consideration of Defendants' Motion for Summary Judgment.

9 For the above stated reasons, Plaintiff's request for a continuance under Rule 56(d) (Dkt.
10 190, 196) is denied.

11 **V. Motion to File Surreply (Dkt. 208)**

12 On January 8, 2019, Plaintiff filed a Request to File Surreply to Counsel's False Claims
13 ("Motion to File Surreply"), requesting permission to file a surreply regarding Defendants'
14 Motion for Summary Judgment. Dkt. 208. Specifically, Plaintiff reasserts his need for additional
15 discovery and seeks to rebut claims asserted by Defendants in Defendants' Motion for Summary
16 Judgment and Reply. *See id.* Pursuant to Local Rule CR 7(g)(2), surreplies are limited to requests
17 to strike material contained in or attached to a reply brief. "Extraneous argument or a surreply
18 filed for any other reason will not be considered." *Id*; *see also Hernandez v. Stryker Corp.*, 2015
19 WL 11714363, at *2 (W.D. Wash. Mar. 13, 2015). As Plaintiff does not request to strike material
20 contained in Defendants' Reply and as surreplies are not considered by this Court, the Motion to
21 File Surreply (Dkt. 208) is denied.

For the above stated reasons, the request that a medical expert be appointed (Dkt. 99) is denied, the Renewed Motion for Counsel (Dkt. 201) is denied, the request that a guardian ad litem be appointed (Dkt. 190, 201) is denied, the request for a continuance under Federal Rule of Civil Procedure 56(d) (Dkt. 190, 196) is denied, and the Motion to File Surreply (Dkt. 208) is denied.

As the Court has provided Plaintiff with an opportunity to file a motion to substitute (Dkt. 220), the Court directs the Clerk to re-note Defendants' Motion for Summary Judgment (Dkt. 177) for April 5, 2019. The Court, however, will not consider any additional briefing or evidence filed in relation to the Motion for Summary Judgment.

Dated this 22nd day of February, 2019.

No Christel

David W. Christel
United States Magistrate Judge